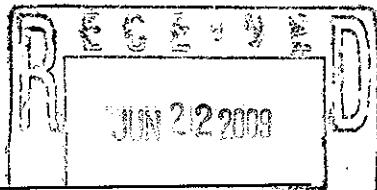


ORIGINAL
CLERK OF COURT

**United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, N.Y. 10004-1408**

Lead Case # 09-50026



MEMORANDUM OF LAW IN OPPOSITION TO SECTION 363 SALE

Part One -- Preliminaries

On 6-15-2009 we wrote to honorable judge that the extremely late notice we received from attorneys for GM did not give us enough time to do legal research in order to prepare necessary "Memorandum of Law" as part of our objection to the 363 Sale, to be heard on 6-30-2009, since we are *pro se* creditors and not professional attorneys ¹. Hence, we sent a preliminary objection on 6-16-2009 (actually filed). Now, we submit the necessary Memorandum of Law in opposition to the proposed 363 sale.

Part Two -- Background Information

According to the 6-1-2009 affidavit filed by GM's President and CEO, Mr. Frederick A. Henderson, GM had an infusion of \$4,000,000,000 cash from the U.S. Treasury on 12-31-2008 and another \$4,500,000,000 on 2-17-2009 ². Reciprocally, GM granted a first lien substantially on all its unencumbered assets, and a junior lien on all its encumbered assets. This means that there are no more

¹ We also filed an adversarial complaint on 6-16-2009.

² Here, the total cash infusion agreed to was \$13.4 billion, and between 2-17-2009 and 4-22-2009 the balance cash was drawn by GM. .

free assets left, on which the unsecured bondholders (**holding \$22,000,000,000 + bond debt**). In order to get this cash infusion, GM had very generously agreed to U.S. Treasury's very onerous demands that the prior unsecured debt of GM be reduced from \$27,000,000,000 to **not less than 1/3rd of it**, i.e. **to no more than \$9,000,000,000**. This means that the U.S. Treasury had demanded that GM wipe out more than \$18,000,000,000 of its unsecured bondholders debt, by hook or crook.

Later, on 3-30-2009, President Obama rejected GM's Viability Plan # II³.

Again, according to Mr. Henderson's affidavit, on 4-24-2009 GM drew another \$2,000,000,000 as per a 4-22-2009 amendment, so that the total draw from U.S. Treasury, by GM was \$15,400,000,000.

Prior to all this cash draw, the following were the positions of GM with regard to net losses and stockholders' deficit., according to page 29 of 4-27-2009 GM's Exchange Offer::

	(In Millions of Dollars)	
	Amount of Net Income/ <u>(Net Loss)</u> for the	Net worth or Stockholders' Equity/(Deficit) <u>At the end of</u>
Year 2005	(\$10,417)	\$14,442
Year 2006	(\$ 1,978)	(\$5,652) ⁴
Year 2007	(\$38,732)	(\$37,094)
Year 2008	(\$30,860)	(\$86,154)

The red ink continued and in the 1st quarter of 2009, GM suffered a net loss of \$5,100,000,000.

Worse than that, GM had suffered a negative cash flow of a massive \$9,400,000,000⁵.

³ It must be remembered here that Mr. Henderson's predecessor, Mr. Rick Wagoner, was mercilessly forced out of GM, at the behest of U.S. Treasury and President Obama's Auto Task Force (ATF), especially at the fiat of a Mr. Steven Rattner, because Mr. Wagoner had advocated that the bondholders of GM, holding unsecured debt of about \$22,000,000,000 + should get a 90% equity in any reorganized GM, according to traditional bankruptcy procedures, inasmuch as the stockholders' equity was totally wiped out, as back as the year 2006.

⁴ This is when GM became an insolvent company.

⁵ Page 29 of Mr. Henderson's affidavit.

So, GM drew another \$4,000,000,000 on 5-22-2009, thus making the total draw out from the U.S. Treasury to \$19,400,000,000. There was also a small draw of about \$361,000,000 on 5-27-2009. If GM's 4-27-2009 bond exchange offer did not go through, with 90% of the bondholders consenting, GM expected to realize the following debt reduction in a Chapter 11 filing, when a U.S. Treasury sponsored Good GM could buy the Old (Bad) GM in a quick 363 Sale (a very diabolical plan hatched by President's Auto Task Force).:

U.S. Treasury – Reduce its debt to \$8.00 billion in notes plus \$2.0 billion in preferred equity and rest in common stock, representing 72.5% control of a U.S. Treasury sponsored New GM's capital⁶;

GM Unsecured Bondholders - Stiff the bondholders by about \$27,000,000,000 and just give them some 4 cents common stock, which would constitute 10% of a proposed U.S. Treasury sponsored New GM's capital⁷; and

Workers' Union - \$6.5 billion in preferred that would guarantee a 9% return, \$2.5 billion in Notes, plus common stock which would constitute 17.5% of a U.S. sponsored New GM

So, here we are with a diabolical scheme hatched by the U.S. Treasury and the President's ATF to administer an "artificial insemination" and create a New GM baby out of the Old (Bad) GM, with this honorable court acting as a mid-wife, if you will. By this time, every one knew or should have known that the bankrupt GM had lost its vitality and virility, and it has become just a dud, and a one cent puppet

⁶ The U.S. Treasury sponsored New GM would acquire all Old (Bad) GM's core assets (**bereft of its crown jewels the bankrupt GM will be christened as Bad GM**) in an expedited 363 sale, free of all liens, encumbrances, and entanglements with bankruptcy cases, for its total stake of \$50.00 billion. There is also a dire and stern warning from the U.S. Treasury (and President's ATF) here: **Delay the 363 sale, and lose billions of dollars in DIP financing. Their mantra is: In we go with dirty hands and out we come with clean hands. The reality, unfortunately, is opposite of what they want the public to perceive and believe.**

Mr. Henderson's prognosis about New GM is that absent DIP financing, GM will have no chance but to liquidate. We believe the bankrupt GM is already comatose, and on a temporary and tenuous life support system, which does not guarantee its revival and/or survival for long. Mr. Henderson's assertion, we believe is also tantamount to blackmailing one and all, in the hearing on the 363 sale, on 6-30-2009.

⁷ The U.S. Treasury has also graciously agreed to give warrants to unsecured bondholders to purchase up to 15% of the total common stock if the unsecured debt does not exceed \$35 billion !!!.

in the hands of the U.S. Treasury and the President's Auto Task Force (ATF).

Part Three – Discussion

We want to come to the heart of the problem right away. This New GM will be nothing but an ill conceived illegitimate child, to be born at an inauspicious moment, and no one really knows who the real father of this baby is – is it the Obama administration, the UAW, the U.S. Treasury Department, or the Auto Task Force ? Do we have time to determine this by having a DNA test (i.e. if the Supreme Court permits it as a constitutional right) ? We guess not.

Issue No. One: About 192,500 U.S. households that had invested \$12,420,000,000 in unsecured GM bonds will get a bum rap through this 363 sale.

We know that GM had 610,505,273 common shares which were wiped out, some time in the year 2006 ⁸. Those shares were held by roughly by 329,407 U.S. households ⁹. GM had also heavily borrowed from the middle class households, **to the tune of \$27,000,000,000**, by promoting the slogan “**what is good for GM is good for America**” and, of course, not vice versa. By the last count, roughly 193,000 U.S. households bought into this myth¹⁰, and blindly put their life savings in these unsecured bonds of GM. Of course, we should exclude about 500 greedy and vulture institutional investors who bought the damaged GM bonds with a **par** value of \$14,580,000,000 (i.e. 54% of total *par* value of unsecured bonds), for a few cents on the dollar – **cost basis** may be just \$729,000,000, and they will not suffer much from any 363 sale ¹¹. These greedy institutional investors were pressured by President's Auto Task

⁸ There are always speculators in the market place that create some artificial sale to lure unwary investors.

⁹ See Schedule 5 of GM's 6-1-2009 Chapter 11 filing.

¹⁰ Pages 77 and 78 in bankruptcy court filing by GM on 6-1-2009.

¹¹ We do not really know what kind of *quid pro quo* is offered to these institutional investors, behind the scenes. Even otherwise, they will hold 5.4% of common stock in the New GM. So, it is a good and profitable deal to them.

Force (ATF) to file their consent in this Chapter 11 filing, so that other non-consenting unsecured family bondholders (holding 46% of the *par* value of unsecured bond debt of GM) can be cornered and the honorable court can be requested to impose on them a similar position. Remember that about 46% of the unsecured bond debt of GM, with a *par* value of **\$12,420,000,000**, is held by **192,500 U.S. family households** which works out to an average investment of **\$64,500** per U.S. family household, **where the cost basis is almost the same as the *par* value**. The U.S. Treasury and ATF, in their graciousness and generosity **are offering these 192,500 U.S. family households a 4.6%** of common stock stake in the New GM (what we referred to as an illegitimate child) after the 363 sale is approved by the court.

Assuming the fundamental equation:

“fair value of assets given up = fair value of assets received”

the fair market value of New GM should be worth about **\$270,000,000,000**, which is pipe dream that can never become a reality.

Alternatively, if the 4.6% stake in the new GM is worth no more than \$460,000,000 (its real intrinsic value), then the **192,500 U.S. family households** that did not consent to the exchange offer **will suffer a huge loss of \$11,960,000,000**. Moreover, at least for a whole generation to come, it is unlikely that the New GM will be in a position to declare and pay any dividend, because it will take years and years for any New GM to break even (this is the most optimistic assessment), and any future profits could and will be easily gobbled up by the union workers of GM who will hold a 17.5% stake in the company, by demanding hefty wage increases for their so-called sacrifices in the past. For workers, self-interest is the best interest (and who can blame for that philosophy !!) and why should they care for bondholders converted into shareholders? These workers had verily learnt and practiced the art of biting the hand that fed them – the sole reason why we are here discussing their employer’s plight.

In short, about 192,500 U.S. family households that had invested \$12,420,000,000 in

unsecured GM bonds will get a bum rap through this 363 sale. Most of these individuals are 65 + years of age and they desperately need interest income from these investments¹². So, we oppose the 363 sale on the basis of the unjust conditions and grounds proposed by the U.S. Treasury and the President's Auto Task Force.

Issue No. Two: Funds made available by U.S. Treasury to GM are, in fact, capital contribution

As explained earlier, the Bush administration in December 2008, and the Obama administration and his Auto Task Force since January 2009 knew pretty much that the now bankrupt GM was actually insolvent¹³ from the first quarter of the year 2006. They had known or they should have known that the massive deficit of \$86,000,000,000 raked up in just under three years between 2006 and 2008 will never allow GM to re-pay any advances made (or to be made) by the U.S. Treasury.

In fact, if any thing, through such advances and the resulting *de facto* control they gained, the U.S. Treasury and ATF had become "insiders" of GM from day number one, and they caused the deepening of the insolvency of GM, to the detriment of unsecured bondholders. The U.S. Treasury and the President's Auto Task Force (ATF) also took full *de facto* control of GM¹⁴, and articulated, demanded, and directed its personnel to do their bidding. In this process, they made GM to breach its

¹² We request this honorable court to very seriously consider whether Age Discrimination is at the root of the proposals by the U.S. Treasury and the ATF to stiff these senior citizens.

¹³ Under Delaware law, a corporation is insolvent if it has: (1) a deficiency of assets below liabilities with no reasonable prospect that the business can be successfully continued in the face thereof, or (2) an inability to meet maturing obligations as they fall due in the ordinary course of business.

¹⁴ Under the "internal affairs" doctrine, anyone controlling a Delaware corporation is subject to Delaware law on fiduciary obligations to the corporation and other relevant stakeholders. See *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 960 (Del. Ch. 2007) (Strine, V.C.) (Explaining that the law of fiduciary obligations is one of the most important ways a state regulates a corporation's internal affairs); RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Section 306. So, we submit that the U.S. Treasury, besides GM have the fiduciary duty, obligation, and responsibility to protect the interests of unsecured bondholders.

fiduciary duty to unsecured bondholders in various ways, to wit, to allow the U.S. Treasury to secure all its assets in violation of the 1995 trust indenture; to have marching orders given to ex-President and CEO, Rick Wagoner, because he had advocated giving a 99% equity interest to unsecured creditors; to aid and abet in the violation and breach of the trust indenture, to violate the fiduciary duty, obligation, and duties to unsecured bondholders etc¹⁵.

Attorneys for these groups may have thought that an artificial contemporaneous documents created will help save all the misdeeds narrated above. Glorification of form over substance will not work. Bankruptcy courts have typically applied an eleven factor test to determine whether monetary advances to corporation should be considered "loans" or "capital contributions" see Roth Steel Tube Co. v. Commissioner, 800 F.2d 625 (6th Cir. 1986) and these (together with our comments) are:

- 1) Names given to instruments, if any, evidencing indebtedness: This is elevating "form" over "substance" and where ab initio the evidence is overwhelming that recovery of advances are slim to nothing, the "form" should be of no use and hence discarded¹⁶.
- 2) Presence or absence of fixed maturity date and schedule of payments: Once again, if evidence shows that the borrowing corporation has no capacity to make scheduled payments, the "form" will be of little value¹⁷.
- 3) Presence or absence of fixed rate of interest and interest payments: Same as in No. 2 above.

¹⁵ We strongly advocate and request this honorable court to hold an evidentiary hearing, after a period of discovery by parties of interest, before an actual hearing could take place on the 363 sale motion.

¹⁶ Schedule-12 filed by GM on 6-1-2009 clearly shows that even with massive doses of cash infusion (in billions of dollars) by the U.S. Treasury, between December 2008 and May 2009, GM anticipates cash receipts of \$2.1 billion and cash disbursements of \$7.8 billion for the month of June 2009, i.e. a net cash shortfall of \$5.7 billion for June 2009. This position is unlikely to reverse for several years to come and the U.S. Treasury and the Auto Task Force knew this cash shortfall situation when those documents were created in the months of December 2008, January 2009, February 2009, March 2009, April 2009, and May 2009..

¹⁷ See footnote # 14 above.

4) Source of Repayments: None whatsoever. No plans were ever indicated. GM became a persona non grata for any loans, bond issues, or raising equity capital. GM's Henderson will attest to this situation.

5) Adequacy or inadequacy of capitalization: GM raked up a cumulative deficit of \$86 billion, in just 3 to 4 years. There is absolutely no chance to raise any new equity from open capital markets until and unless GM becomes profitable and erases its accumulated deficit, and thus be in a position to pay regular dividends to its shareholders.

6) Identity of interest between creditor and stockholder: By virtue of gaining de facto control over GM's affairs, under the guise of making billions of dollars available to it, the U.S. Treasury and the President's Auto Task Force became "insiders" of GM, and thus fiduciaries for unsecured creditors.

7) Security, if any, for advances: Illegal security interest was created in breach of the 1995 indenture, to the detriment of unsecured bondholders. GM breached the indenture document, and the U.S. Treasury instigated, and aided and abetted in such a breach. This action also violated their fiduciary responsibilities, duties, and obligations towards unsecured bondholders (i.e. by both GM and the U.S. Treasury).

8) Corporation's ability to obtain financing from outside lending institutions: None. See the earlier comments. ("The fact that no reasonable creditor would [lend funds] is strong evidence that the advances were **capital contributions rather than loans.**" *Roth*, 81100 F.2d at 631). (emphasis supplied).

9) Extent to which these advances were subordinated to claims of outside creditors: None.

10) Extent to which advances were used to acquire capital assets: No capital improvements took place. The cash draws from the U.S. Treasury were used by GM to meet its operating cash shortfalls.

11) Presence or absence of sinking fund to provide repayment: None to the best of our knowledge.

We understand that no one factor is controlling and the court must look to particular circumstances of each case, *In re AutoSTYLE PLASTICS, INC.*, 238 B.R. 346 (Bankr. W.D. Michigan 1999), *In re Cold Harbor Associates, L.P.* 204 B.R. 904 (Bankr. E.D. Va. 1997).

We submit that on balance, the *Roth* factors being considered, this honorable court should come to the conclusion that all cash advances made by the U.S. Treasury to GM prior to this Chapter 11 filing should be reclassified as capital contributions, rather than loans. This conclusion will also be in consonance with the U.S. Treasury's present move to create a New GM in which it wants to hold a 72.5% equity stake. We also submit that this honorable court should condemn the U.S. Treasury's circumnavigation to acquire and nationalize GM, rather than following a straight path of buying the company outright (at its fair market value), if that is how it wants to help the political allies of President Obama..

If this honorable court were to grant this request, we are sure, that the purchase price equation in the proposed 363 Sale will change drastically, and the debtor GM and the U.S. Treasury, and the President's Auto Task Force will have to come back to this court with a more equitable plan that would protect the interests of the unsecured creditors, and especially the unsecured bondholders.

Issue No. Three -- What about deferred tax refund assets ?

The debtor had raked up about \$86,000,000,000 worth of operating losses through the year 2008 and then in the first quarter you may add another \$5,000,000,000, for a grand total of \$91,000,000,000 in operating losses. The tax code allows the corporation to go back for two years and recover some tax payments (refunds to be claimed) and any unused balance of operating loss (NOL) can be carried forward for a period of 20 years. This means that potentially there will be less tax payments of \$31,850,000,000. in the future. We submit that this issue was not addressed properly in the proposed 363 Sale.

In fine, for the various reasons mentioned herein above, we oppose the proposed 363 Sale of the "Crown Jewels" of the current bankrupt GM to a New GM, thereby leaving trashy trinkets to Old (Bad) GM.

Respectfully submitted..

Dated at New Haven, this 19th day of June, 2009.

CREDITORS (*Pro Se*)


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Certificate of Service

Certified that the aforementioned "Memorandum of Law" in Opposition to the 363 Sale" has been mailed to the following parties, this 19th of June, 2009, postage duty paid in full.

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